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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. [redacted] 159

AMERICAN EXPORT LINES, INC.,
Petitioner,

v.

HOWARD ALI AMMAR,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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AMERICAN EXPORT LINES, INC.,
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HOWARD ALI AMMAR,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above case on January 27, 1964.

Citations to Opinions Below

The opinion of the Circuit Court of Appeals printed in Appendix B hereto, infra, p. 3a, is reported in 326 F. 2d 955. The District Court opinion on damages, a matter not involved in this petition, printed in Appendix Record, Vol. I, p. 181a, was not officially reported.

Jurisdiction

The judgment of the United States Court of Appeals was entered on January 27, 1964. Rehearing was denied without opinion on March 11, 1964. The jurisdiction of this Court is invoked under 29 U. S. C. Section 1254 (1).

Question Presented

1. When a merchant seaman injured aboard ship is negligently involved in a motorcycling accident nearly 20 months later and then claims additional damages, is the shipowner entitled to a jury determination under the Jones Act of whether or not the subsequent harm was reasonably foreseeable?

2. When a merchant seaman injured aboard ship is negligently involved in a motorcycling accident nearly 20 months later and then claims additional damages, did the trial Judge commit error, as both parties urged on appeal, in charging the jury in terms of comparative negligence with respect to the second accident?

3. Is not this merchant seaman's riding a strange motorcycle at night while disabled from an independent unrelated groin injury such an intervening cause as to require the trial Judge to take the question of the ensuing damages from the jury?

Statutes Involved

The statutory provisions involved are sections 1 and 3 of the Federal Employer's Liability Act, 35 Stat. 65, 45 U.S.C. § 51; 35 Stat. 66, 45 U.S.C. § 53 and the Jones Act, 41 Stat. 1007, 46 U.S.C. § 688. They are printed in Appendix A, *infra*, pp. 1a and 2a.

Statement

The complaint was filed on October 14, 1960 to recover damages for personal injuries sustained by Howard Ali Ammar against his employer, American Export Lines, Inc., resulting from a shipboard accident on November 29, 1959, while Ammar was employed as a seaman on board the s/s Independence. After Ammar was injured on a motor-

cycle on July 20, 1961, the complaint was amended to recover additional damages for far more substantial injuries caused by the motorcycling accident. The case was tried from May 21, to May 29, 1963, before the Honorable Edward C. McLean and a jury resulting in a verdict for the plaintiff for the sum of $197,261.45 (Appendix Record, Vol. I, p. 12a). The jury awarded $11,000 for the shipboard accident of November 29, 1959 and the net sum of $183,725.40 for the motorcycle accident of July 20, 1961, finding plaintiff guilty of 59.64% contributory negligence (Appendix Record, Vol. I, pp. 152a and 153a). At the close of the testimony; the trial Judge expressly refused to instruct the jury in accordance with defendant's requests to charge on the concept of foreseeability and plaintiff's continuing duty to exercise reasonable care following his initial accident (Appendix Record, Vol. I, p. 149a). As to each accident the Judge's charge indicated awards should be made for the temporary and permanent conditions (Appendix, Vol. I, p. 144a). In charging the jury, the Judge also dealt separately with the unseaworthiness and negligence theories of liability. In his instructions on proximate cause under the unseaworthiness count, the concept of foreseeability was adequately covered by stating that the cause must not be a remote one, and it must be a cause unbroken by an efficient intervening cause (Appendix Record, Vol. I, p. 137a). However, the foregoing proximate cause definition was omitted from the Judge's explanation of proximate cause as it applied to the negligence theory (Appendix Record, Vol. I, p. 139a). Significantly, the jury was unable to reach an agreement on the unseaworthiness count, the explanation of which contained foreseeability instructions, but found the defendant liable on the negligence count, the explanation of which did not contain foreseeability instructions (Appendix Record, Vol. I, 151a).

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals for the Second Circuit adopted a theory in conflict with the theory of causation recognized by both the Court of Appeals for the Fourth Circuit in *Boxers* v. *Seas Shipping Co.*, 185 F. 2d 352 (1950), and the Court of Appeals for the Seventh Circuit in *Repsholdt* v. *United States*, 205 F. 2d 852 (1953). Both these Courts dismissed libels brought by injured seamen under the Jones Act because each injured seaman failed to prove that a relatively minor accident was the "proximate cause" of a subsequent severe injury.

Significantly, the above courts also dismissed the maintenance and cure count, which requires no showing of fault, because of the seamen's failure to exercise reasonable diligence following his initial accident. In the *Boxers* case the Fourth Circuit refused to relate a fractured ankle sustained on January 27, 1949 to a knee injury on November 18, 1948 (at p. 354). In the *Repsholdt* case the Seventh Circuit refused to relate a fall on April 19, 1948 and a second fall in February of 1951 to a knee injury sustained on March 4, 1948 (at p. 857).

The necessity of a charge as to reasonably forseeable consequences is especially apt insofar as awards for permanency are concerned. Otherwise a jury's award for permanent conditions must relate to personal prejudice as well as to legal proof. Beyond this the jury's award for the first accident included, under the charge, damages for both temporary total and permanent partial disability (Appendix Record, Vol. I, p. 144a). The award for the second accident then, under the charge, provided a double recovery.

Finally, the opinion below is in conflict with the interpretation of the New York Court of Appeals of a liberal Workmen's Compensation Statute. In case of *Sullivan* v.

B. & A. Construction, 307 N. Y. 161 (1954), the court refused to relate an automobile accident occurring on June 30, 1950 to two earlier accidents on March 24, 1948 and June 17, 1949. Claimant had slipped on a paint brush and then fallen when a ladder broke, injuring and re-injuring his right knee. Then, while driving his car, the tie rod broke and his right knee "locked" preventing his applying the brake. The court held that while the earlier injuries may have been a "but for" cause of the accident, they certainly did not constitute the requisite legal or proximate cause. When claimant ignored his locking knee and without justification, continued to drive, responsibility for the accident and its consequences could no longer be ascribed to his employment-created disability. Had claimant been ignorant of the extent of his disability, had his knee not previously locked while driving, the case might conceivably have been different. However, it was indisputable that claimant's own act of driving, supervening between the industrial accidents and the car crash, broke the essential chain of causation. *Ibid.* p. 165.

2. The petitioner unquestionably has been deprived of a jury determination of a disputed question of fact vital to the case (Appendix B, p. 7a). This Court has repeatedly held that where jury trials are required, courts must submit the issue of negligence to a jury if the evidence might justify finding either way on this issue and certiorari has been repeatedly granted because of the importance the Court placed on the necessity of preserving for litigants in F.E.L.A. [and Jones Act] cases their right to a jury trial. *Wilkerson v. McCarthy*, 336 U. S. 53, 55 (1949). While the foregoing case, as well as those which follow, are all cases where the Court has found that plaintiffs were deprived of a jury determination, Mr. Justice

Douglas in his concurring opinion in *Wilkerson*, supra, pointed out that:

> "The criterion governing the exercise of our discretion in granting or denying certiorari is not who loses below but whether the jury function in passing on disputed questions of fact and in drawing inferences from the proven facts has been respected" at pp. 70-71.

On the trial of this action, petitioner submitted to the trial Judge certain instructions, requesting that they be given to the jury following the conclusion of all of the evidence. These instructions in general dealt with the foreseeability of a subsequent motorcycling accident and the circumstances surrounding this accident, as well as the plaintiff's continuing duty to exercise reasonable care following the initial shipboard accident up to and including the time of the motorcycle accident (Appendix Record, Vol. I, pp. 117a-24a). All of these requests were expressly denied by the trial Judge (Appendix Record, Vol. I, p. 149a). These denials resulted in the anomalous situation of requiring the jury to consider proximate cause in two different lights, for in his instructions, the trial Judge separately discussed the unseaworthiness and negligence theories of liability. As to the unseaworthiness, he explained that in order to constitute proximate cause, the cause must not only actually contribute to the result, but such a cause must not be a remote one and that it is a cause which in a natural and continuance sequence, unbroken by any efficient intervening cause, helps to produce the injury without which the accident would not have happened (Appendix Record, Vol. I, p. 137a). In explaining proximate cause as it applied to the Jones Act count, the Judge omitted all considerations of foreseeability, remoteness and efficient intervening cause (Appendix Record, Vol. I, p. 139a) The jury, of course,

was not able to reconcile these diverging definitions with the result that they could not reach an agreement on the question of unseaworthiness (Appendix Record, Vol. I, p. 151a), which on its face is an unusual eventuality, since this concept, requiring a greater degree of proof than negligence, has permitted recovery over an awesome spectrum of maritime cases. However, the separate definitions of proximate cause, at least, points up the fact that the trial Judge did not as a matter of law reach the conclusion that plaintiff's action in boarding the motorcycle was not an intervening efficient cause breaking the chain of proximate causation, notwithstanding the assertion to the contrary contained in the opinion below (Appendix B, p. 7a).

The Appellate Court agrees with petitioner "that the charge withdrew from the jury the question of remoteness of damages with respect to the negligence claim" (Appendix B, p. 7a). However, this area of agreement does not extend to a subsequent statement contained in the opinion below which holds that:

> "[A]lthough *Rogers* [v. *Missouri Pacific R. Co.*, 352 U. S. 500 (1957)] did not involve a subsequent accident, we think it excludes in Jones Act cases the application of causation analysis to limit liability for remote damages" [Appendix B, p. 8a].

On the contrary, the holding in the *Rogers* case, supra, not only sanctions causation analysis, but prohibits the exclusion of disputed questions of fact from the jury's consideration. Implicit in the Court's opinion reversing the Missouri Supreme Court and reinstating the jury verdict, is the fact that the jury was instructed on the foreseeability aspect of plaintiff's on-the-job accident. More importantly, the *Rogers* case did not strike from the F. E. L. A. the word *"negligence"*. Negligence is still the basis of re-

covery in F. E. L. A. [and Jones Act] cases and foreseeability remains an essential element of negligence. However, if the language of the *Rogers* case could have been interpreted to cast doubt on the fact that foreseeability was part of a Jones Act case, this doubt was resolved in the recent case of *Gallick* v. *Baltimore & Ohio R.R. Co.*, 372 U. S. 108 (1963), in which Mr. Justice White, speaking for the majority, stated unequivocably that foreseeability remains an essential ingredient of an F. E. L. A. case. He further explained that there are two aspects of the concept: foreseeability as to the extent of the injuries and foreseeability of harm. Only the latter remains viable in F. E. L. A. cases. Unlike the instant case, the underlying problem in the *Gallick* case was one involving the extent of plaintiff's injuries, which, as the Court points out, need not be foreseeable. In that case, the petitioner had been bitten by a mosquito, the bite subsequently became infected and the infection resulted in the amputation of both legs. Hence, the end result followed a natural sequence of events. Moreover, neither of the above decisions involved a subsequent accident which occurred during the recreational hours of a former employee, as did the accident with which we are here concerned.

Finally, the court below not only struck causation analysis from Jones Act cases, but extended the protection of the Statute even beyond the limitations of a liberal State Workmen's Compensation Act. In the case of *Sullivan* v. *B & A Construction Co.*, 307 N. Y. 161 (1954), the claimant, alleging a causal connection between a prior on-the-job accident and a subsequent accident, sought to recover an award under the New York State Workmen's Compensation Statute, for injuries flowing from a subsequent off-the-job automobile accident. The award was denied as a matter of law by reason of claimant's own negligence in attempting to operate his automobile. See also

Bowers v. *Seas Shipping Co.*, 185 F. 2d 352 (4 Cir. 1950); *Repsholdt* v. *United States*, 205 F. 2d 852 (7 Cir. 1953); *Snow* v. *New York, New Haven Hartford R. Co.*, 185 Mass. 321, 70 N. E. 205 (1904). Petitioner submits that striking causation analysis from the Jones Act and thus excluding such analysis from the jury's consideration renders the poignant words of Mr. Justice Brennan particularly apropos: "special and important reasons for the grant of certiorari in these cases are certainly present when lower Federal and State Courts persistently deprive litigants of their right to a jury determination". *Rogers*, supra, at p. 510.

2. The questions presented are also of overriding importance in the administration of the Jones Act and the Federal Employer's Liability Act. On the one hand, the opinion of the Court of Appeals for the Second Circuit affirms a novel and unprecedented application of the comparative negligence doctrine. The court below concedes that "neither the parties' research nor our own has disclosed any decision dealing * * *" with the question of whether the doctrine of comparative negligence should be applied to the damages of a subsequent accident (Appendix B, p. 10a). There is no authority for applying the doctrine of comparative negligence to this question because this equitable doctrine grew out of the Common Law concept of contributory negligence, which is today and always has been, applied to those acts of the plaintiff which are contemporaneous with the defendant's tortious conduct, which resulted in harm to plaintiff. It is at this time that a defendant's negligence ends. While a defendant may under certain circumstances be liable for subsequent damages, this liability is not decided on the basis of comparative negligence. In the instant case, petitioner's negligence ended with the occurrence of the shipboard accident at Madeira and 20

months later respondent failed to exercise due care in boarding a motorcycle in Long Island. This sequence of events gives rise to legal principles different from and alien to the doctrine of comparative negligence. The validity of this contention is patently apparent in the Statute (F. E. L. A., 45 U. S. C. §§ 51, 53 (1958). See also *Ellerman Lines, Limited* v. *The President Harding*, 288 F. 2d 288 at 290 (2d Cir. 1961), Clark, *New York Law of Damages*, (1925) § 113, pp. 203-205; *Murphy* v. *American Barge Line Co.*, 169 F. 2d 61, 64 (3 Cir. 1948).

In their briefs below not only petitioner but also respondent took the position that the doctrine of comparative negligence was an inappropriate vehicle for determining the rights of the parties with respect to the damages flowing from the motorcycle accident (Appendix B, p. 10a). Respondent contended that the amount of these damages should have been decided under the doctrine of "avoidable consequences". Petitioner urged that these rights should be determined in terms of foreseeability, efficient intervening cause or avoidable consequences (Appendix Record, Vol. I, pp. 117a-124a, Pet. for Rehearing pp. 5, 6, 9). In this context, any attempt to distinguish one of the foregoing concepts from the remaining two is but an exercise in semantics because the fact is that Howard Ali Ammar had a continuing duty to exercise reasonable care following his accident aboard ship. *Ellerman Lines, Ltd.* v. *The President Harding*, *Murphy* v. *American Barge Line Co.*, *supra*; Harper & James, *Law of Torts*, (1956) Vol. II, §§ 22.10, pp. 1231-32; 25.4, p. 1307; *Restatement of Torts*, Vol. IV § 918; Prosser, *Law of Torts* (2d Ed. 1955 p. 287; McCormick, *On Damages* (1935) § 33; Clark, *New York Law of Damages* (1925) § 113. To argue that the imposition of such a duty on a plaintiff is unjust and to liken it to the Common Law "all or nothing" concept of contributory negligence is to avoid meeting the problem. Upon a jury

finding of negligence with respect to the shipboard accident, plaintiff was clearly entitled to the damages flowing therefrom in the absence of contributory negligence. But the jury should have been permitted to consider the rights of the parties in accordance with the principles urged in the briefs as to the motorcycle accident damages. In the reply brief below, petitioner set forth at length the comments of the leading text writers with respect to the doctrine of avoidable consequences. The essence of these comments is succinctly set forth in the following quotation from Harper & James, *Law of Torts,* (1956) Vol. 2 § 22.10 pp. 1231-32:

> "The rule of avoidable consequences. * * * After the original impact or injury (to which plaintiff's negligence did not contribute), plaintiff's negligence may intervene to aggravate its consequences. * * * In cases like these plaintiff may not recover for that aggravation to his injury towards which his negligence contributes. This notion is sometimes referred to as the duty to mitigate damages or the rule of avoidable consequences".

Petitioner's requested instruction # 14, which was expressly denied by the trial Judge, embodies the substance of this doctrine:

> "If you find that under the circumstances, the riding of the motorcycle was negligent, then you must find for defendant with respect to the damages flowing from the second accident" [Appendix Record, Vol. I, p. 121a].

Obviously, defendant American Export Lines had no connection with the motorcycle accident outside plaintiff's home. The jury's finding of 59.64% comparative negligence (Appendix Record, Vol. I, p. 153a) indicates plaintiff's own fault was overwhelming. Under the charge as given defendant is liable for the negligence of any and

all others, such as that of the motorcycle owner, in connection with the motorcycle accident damages. In the light of the foregoing it is inescapable that under a proper charge the jury would have found for defendant with respect to the motorcycle accident.

On the other hand, the opinion below also contravenes the purpose of the Federal Statutes here involved. Although public policy requires the submission of seaman's and railway worker's injury claims to juries in the expectation that liability for awards will require employers to adopt safe working practices, it is unprecedented to hold liable an employer for a former employee's unregulated wholly disconnected recreational accident resulting in harm. The trial of this case clearly established that Howard Ali Ammar on the evening of July 20, 1961 was negligently involved in an accident following his decision to take a ride on a strange motorcycle belonging to a friend (Appendix Record, Vol. I, 38a, 39a). He not only did not know the location of the hand brake, but at the time was not fit for duty having been found so by a United States Public Health Service physician by reason of a prior unrelated groin injury (Appendix Record, Vol. I, pp. 46a, 50a; 112a). Respondent claims to have had recurrent "blackouts" following the 1959 shipboard accident and as a result of one of these "blackouts" lost control of the motorcycle. He testified that a scant two months before the motorcycle accident he had had a "blackout"; thus does not the fact that he boarded a motorcycle with this knowledge constitute the ultimate breach of his duty to exercise due care (Appendix Record, Vol. I, p. 37a). Congress intended these Statutes to serve as a means by which seaman and railroad workers could obtain compensatory judgments for on-the-job injuries. The statutes are not a form of health insurance. This protection is provided for by the Social Security Act and in New York State by the Disability Insurance Law. To extend the comparative

negligence doctrine of the Jones Act and the Federal Employer's Liability Act to shoreside vehicular accidents, as to which the defendants obviously have neither notice nor investigatory power, is but to invite litigation without merit.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated: New York, N. Y., June 4, 1964.

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APPENDIX A

Statutes Involved

Federal Employers' Liability Act:

Sec. 1, 35 Stat. 65 (1908), 45 U. S. C. § 51 (1958)

Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

Sec. 3, 35 Stat. 66 (1908), 45 U. S. C. § 53 (1958)

Contributory negligence; diminution of damages

In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

Jones Act, 41 Stat. 1007 (1920), 46 U. S. C. § 688 (1958)

Recovery for injury to or death of seaman

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right to remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

APPENDIX B

(Opinion of Hays, *C. J.*)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 219—September Term, 1963.

(Argued December 12, 1963 Decided January 27, 1964.)

Docket No. 28479

HOWARD ALI AMMAR,

Plaintiff-Appellee,

—v.—

AMERICAN EXPORT LINES, INC.,

Defendant-Appellant.

BEFORE:

CLARK,* SMITH AND HAYS,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York, Edward C. McLean, *Judge*, entered on a jury verdict in favor of a

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*The late Judge Charles E. Clark heard oral argument on this case but did not participate in its decision.

seaman in a suit under the Jones Act, 41 Stat. 1007 (1920), 46 U. S. C. § 688 (1958).

Affirmed.

ROBERT KLONSKY of DiCostanzo, Klonsky & Sergi, Brooklyn, New York, for Herman N. Rabson, *Attorney for Plaintiff-Appellee.*

JAMES M. ESTABROOK of Haight, Gardner, Poor & Havens, New York City (Hollis M. Walker, Jr., on the brief), *for Defendant-Appellant.*

HAYS, *Circuit Judge:*

Defendant shipowner, American Export Lines, appeals from a verdict of $197,261.45 rendered against it in favor of a seaman, Ammar, in a suit under the Jones Act, 41 Stat. 1007 (1920), 46 U. S. C. § 688 (1958). Plaintiff has filed a cross-appeal complaining of the reduction of damages because of plaintiff's contributory negligence and of the exclusion of certain home nursing expenses in the determination of defendant's liability for maintenance and cure.[1]

Plaintiff was the victim of two accidents. The first occurred on November 29, 1959, when he fell from a platform while working on his ship. The second occurred on July 20, 1961, some 20 months later, when he rode a motorcycle into

[1] Plaintiff does not press the point regarding home nursing expenses on this appeal. In any event the ruling below was proper. By making available to the seaman the free medical services afforded by the Marine Hospital service a shipowner may limit recovery to such maintenance and cure expenses as cannot be obtained by recourse to those services. The shipowner was not required in this case to honor the seaman's preference for private treatment. *Kossick* v. *United Fruit Co.*, 365 U. S. 731, 733 (1961); *Calmar S.S. Corp.* v. *Taylor*, 303 U. S. 525, 531 (1938).

a wall. Plaintiff's claim with respect to the second accident was that it was caused by a blackout which resulted from a brain injury incurred in the first accident.

The issue of liability for the first accident was submitted to the jury by special interrogatories on two theories, unseaworthiness and negligence. The jury was unable to agree on unseaworthiness, but found that defendant was negligent and that this negligence was the proximate cause of plaintiff's brain injury. The plaintiff was found free from contributory negligence with respect to the shipboard accident and damages were assessed at $11,000. As to this part of the action, there is no real controversy on this appeal.

After the shipboard accident and as a result of his brain injury plaintiff suffered recurrent blackouts. He was advised by Public Health Service doctors that the blackouts would eventually stop. The last blackout that he experienced prior to the motorcycle accident occurred two months before the accident, in May 1961. On July 20, 1961, plaintiff, who was not working because of an unrelated injury, mounted a friend's motorcycle, went into a skid from which he recovered, and, then, after traveling perhaps seventy feet, crashed into the wall of a house. Plaintiff explained that he had blacked out after coming out of the skid. Defendant introduced evidence to contradict plaintiff's claim that the motorcycle accident was the result of a blackout and argued that, if plaintiff had blackouts, then he had been negligent in boarding a motorcycle, knowing of his susceptibility, and also because he was unfamiliar with the operation of the particular model of motorcycle.

The injuries which plaintiff incurred in the second accident were extremely severe. His spinal cord was severed, resulting in total quadriplegia.

The jury found that the defendant's negligence with regard to the shipboard accident was a proximate cause of

the motorcycle accident and that plaintiff's damages were $455,216.67. However, the jury found further that plaintiff was contributorily negligent as to the motorcycle accident and that 59.64 percent of plaintiff's damages were attributable to such contributory negligence. Applying this percentage the jury rendered a verdict for plaintiff for the second accident in the sum of $183,725.45.

I.

On this appeal defendant relies chiefly[2] on the claim that the district court erred in not instructing the jury on the issue of "foreseeability" with respect to the second accident. The word "foreseeability" has a number of different meanings in the law of torts and the concept is one of variable and shifting content.

We can derive the meaning which the defendant attaches to the word from his argument that the second accident was not foreseeable because, as the jury found, intervening negligence of the plaintiff contributed to that accident. If foreseeability is a material element of the plaintiff's case then this argument would require granting judgment for the defendant as a matter of law. But defendant also argues, somewhat inconsistently, that whether plaintiff's intervening negligence would make the second accident unforeseeable is a question of fact for the jury under proper instructions.

In charging the jury the court separately discussed the unseaworthiness and negligence theories of liability. As to

[2]Defendant also objects to plaintiff's counsel's having read to the jury in his summation a doctor's report that was not in evidence. The doctor had made two reports. Only the first report was in evidence, and the plaintiff's counsel read from the second. But since the second report said in substance what the doctor had stated on the stand, any error was harmless.

unseaworthiness the court indicated that the plaintiff was required to prove that any unseaworthiness was a proximate cause of injury to plaintiff, and proximate cause was defined as:

> "a direct causal connection between the ship's unseaworthiness and the plaintiff's injury. To constitute a proximate cause not only must the cause actually contribute to the result, but such a cause must not be a remote one. It is a cause which, in a natural and continuous sequence, unbroken by any efficient intervening cause, helps to produce the injury and without which the accident would not have happened."

But although in discussing the negligence theory the court reiterated that the plaintiff must show proximate causation, the definition previously used, which included the remoteness element, was not repeated. Instead the court stated only that:

> "Under the Jones Act, it is not necessary that defendant's negligence be the sole proximate cause of [the] injury. It is sufficient if defendant's negligence played any part, even the slightest, in producing the injury."

Defendant contends that the jury must have concluded that even though defendant's negligence was a remote cause separated from plaintiff's second injury by plaintiff's intervening negligence, plaintiff could recover under the negligence claim if defendant's negligence played any part at all in producing the injury. We agree with defendant that the charge withdrew from the jury the question of remoteness of damages with respect to the negligence claim. We believe, however, that the district court was correct in its conclusion that the employee's negligence was not an intervening efficient cause breaking the chain of proximate causation.

We think that the proper analysis for FELA and Jones Act cases is contained in *Rogers* v. *Missouri Pacific R.R. Co.*, 352 U. S. 500 (1957). In that case the courts below had reversed a jury verdict for the employee on the ground that the accident was the result of an emergency brought about by the employee's inattention. Noting that the state court's opinion could be interpreted as holding that if the employee's conduct was at least as probable a cause for his mishap as any negligence of the respondent the employee could not recover, the Supreme Court held that the jury's function had been improperly invaded. The test of a jury case, said the Court, was:

> "simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence" (352 U. S. at 506).

It was of course this statement that was the source of the jury charge in the present case. Although *Rogers* did not involve a subsequent accident, we think it excludes in Jones Act cases the application of causation analysis to limit liability for remote damages.

It is well established that the intervening negligence of a third party is not sufficient to insulate the original actor from liability on grounds of unforeseeability. *Fredericks* v. *American Export Lines*, 227 F. 2d 450 (2d Cir. 1955), cert. denied, 350 U. S. 989 (1956); *Slattery* v. *Marra Bros.*, 186 F. 2d 134, 136 (2d Cir.), cert. denied, 341 U. S. 915 (1951). In view of the liberal guidelines established by *Rogers* v. *Missouri Pacific R.R. Co.*, *supra*, and *Gallick* v. *Baltimore & Ohio R.R. Co.*, 372 U. S. 108 (1963), we think

that a Jones Act claimant's intervening negligence must be treated similarly. No distinction can be drawn between the negligence of a third party and that of a claimant in terms of either proximate causation in fact or foreseeability in fact. The only policy basis for a difference in treatment is that a claimant has less of an equitable claim for relief when his own negligence has contributed to his injuries than when the negligence of a third party is involved. This distinction may have a bearing in the application of a workmen's compensation act that does not permit apportionment of damages and thus presents a choice between complete recovery or no recovery, see *Sullivan* v. *B & A Constr., Inc.*, 307 N. Y. 161, 120 N. E. 2d 694 (1954). But we do not think it is applicable to a system such as the Jones Act in which contributory negligence may be considered in reduction of damages, since the purpose of such a system is precisely that of excluding the claimant's fault from the determination of the question of liability. In the present case plaintiff's negligence was accorded all the significance to which it was entitled when the jury reduced plaintiff's damages by 59.64%. Thus we hold that the lower court properly eliminated from the jury's consideration the question of remoteness of damages. See *Fredericks* v. *American Export Lines, supra;* Prosser, Torts, § 50 (2d ed. 1955).

II.

In his cross-appeal plaintiff argues that since the jury found that he was not negligent with regard to the shipboard accident it was improper to diminish the damage award solely because of his negligence in the second accident. That is, plaintiff contends that the doctrine of comparative negligence applies only to contributory negligence

at the commencement of the chain of causation. Although this point was not properly preserved by an objection to the jury instructions, see Fed. R. Civ. P. 51, we rule upon it since its decision was implicit in our analysis of the problem of remoteness of damages.

Neither the parties' research nor our own has disclosed any decision dealing with this question. Section 3 of the Federal Employers Liability Act, 35 Stat. 66 (1908), 45 U. S. C. § 53 (1958), which is incorporated by reference in the Jones Act, provides that:

> "the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee * * *"

On its face the statute would appear equally applicable whether the claimant's negligence occurs at the commencement or the end of the chain of causation. Moreover, were we to accept plaintiff's contention that the comparative negligence portion of the statute does not apply to the subsequent accident we would be hard put to it to hold that plaintiff could still reap the benefits of the portion of the statute that eliminates contributory negligence as a bar to recovery. In that event plaintiff would not be able to recover any of the damages attributable to the second accident. Since we conclude that the liberal policies of the Jones Act are best served by the apportionment of consequential damages on the basis of fault rather than by an all or nothing rule of liability, we hold that the reduction of plaintiff's damages because of his negligence in the second accident was proper.

We affirm the judgment of the court below.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. ~~1192~~ 157

AMERICAN EXPORT LINES, INC.,

Petitioner,

—against—

HOWARD ALI AMMAR,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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On Brief in Opposition

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 1192

AMERICAN EXPORT LINES, INC.,

Petitioner,

—against—

HOWARD ALI AMMAR,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

Opinion Below

The opinion of the Circuit Court of Appeals is printed in petitioner's appendix and is officially reported in 326 F. 2d 955.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition served on June 4, 1964, except that initial jurisdiction was under and by virtue of the Jones Act (46 U. S. C. 688).

Questions Presented

1. As to the first question presented by petitioner on page 2 of its brief, does not the opinion below by Hays, *C.J.*, follow this Court's prior holdings that employer negligence, even the slightest in Jones Act cases, prompts shipowner liability, to exclude the application of causation analysis to limit liability for remote damages?

Apart from the opinion of the Court below, does not the general Trial Court's Charge to the jury on proximate cause and negligence actually include the surplus ingredient of strict foreseeability in the jury's consideration of damages flowing from the causally related motorcycle accident?

2. Where the comparative negligence doctrine was applied to the second accident by the Trial Court's Charge, placing on respondent a much greater legal duty to avoid contributing negligently to the aggravation of his injuries, rather than the lesser duty of the respondent required under the doctrine of avoidable consequences, with petitioner already clothed as a tortfeasor by reason of its conceded sole negligence for the first accident, can petitioner be heard to complain?

Respondent agrees with the Courts below that the measure of comparative negligence should be applied to the second accident but only in relation to the degree of respondent's contributory negligence under the avoidable consequences doctrine. Inasmuch as petitioner did not plead a defense of avoidable consequences, nor offered any request to charge on that specific defense, is it not precluded by Rule 51, F.R.C.P. to raise this issue on appeal; and should not the jury's 12th and 13th answers to special interrogatories that diminished respondent's recovery by

59.64 per cent contributory negligence be stricken and respondent be awarded full damages, which the Trial Court found was not excessive? (181a et seq.).

3. As to the third question presented by petitioner on page 2 of its brief: is it not a non-sequitur to accept the jury's finding of proximate cause between petitioner's negligence and the motorcycle accident, and then label the latter an intervening cause sufficient to break the causal chain?

From this is drawn the following:

a. Where the jury found petitioner's negligence a proximate cause, and this must be related solely to the symptom of "blackout" caused by organic brain damage, as charged (141a), could the riding of the motorcycle be ascribed to an intervening cause or contributory negligence?

b. Where respondent was assured by the U. S. Public Health Service doctors, and by the medical examiner for petitioner, that he did not suffer from blackouts caused by organic brain damage, prompted in major part by petitioner's failure to submit the all important ship's hospital findings that included a bloody spinal tap, to any subsequent examiner, can petitioner benefit by its continuing negligence and contend that respondent, without a blackout symptom for two months prior to the motorcycle accident, with a background of competence in riding motorcycles hundreds of times without an accident, should not have done what was natural and reasonable for him to do under the circumstances involved?

Numbers in parentheses with suffix "a" refer to defendant-appellants' appendix to its brief to the Court of Appeals below; without the suffix "a", to plaintiff-appellee's appendix below.

c. Where petitioner did not request a charge under the avoidable consequence doctrine, can it now contend that respondent failed to take a different choice than the one prompted by its wrong?

Statement

Respondent, a merchant seaman, 27 years of age on November 29th, 1959, in the capacity of reefer oiler, was caused to fall from a makeshift platform, not part of the original design of the S.S. Independence, in the course of his work while reading temperature gauges. He was precipitated to the concrete deck below, striking his head and back, and rendered unconscious. Petitioner's failure in multiple respects to furnish its seaman-employee a reasonably safe place to work on this confined, slippery and poorly illuminated platform, without any safety devices to protect and save his person, need not be recounted here. Petitioner does not contest the jury's findings on this accident by the answer to the second interrogatory that petitioner was negligent, and by the answer to the sixth interrogatory that respondent was free of any contributory negligence (151a, 152a).

After being rescued, respondent was taken by attendants to the ship's hospital where he remained as a patient for the remainder of the voyage, from the Azores, complaining of his head, back and numbness of his entire left side (31a). Prior to his service aboard this vessel he had been in good condition, without head or back complaints (17a, 19a, 20a). On December 5, 1959, when the vessel docked in New York, respondent was taken to the U. S. Public Health Service Hospital by ambulance (32a, 49). The records of the latter hospital did not include the ship's hospital record. All that was noted were respon-

dent's advices that he had increased pressure while aboard ship (65). A medical expert on behalf of the petitioner admitted that this oral advice was a "meaningless" phrase (65).

The ship's hospital record discloses that for the crucial six days following the accident the findings included "blurring of entire left disc margin . . . vomited three times last night, continued with severe headaches, backaches . . . persistent papilledema left . . . about five c.c.'s of blood contaminated spinal fluid removed, under increased pressure" (52), with other notations of nausea, dizziness, pounding sensation in head requiring use of icecaps, with blood pressure variation from 108 82 down to 86 56 (58). The personal injury report, also retained by the petitioner and kept from succeeding treating and examining physicians, noted a bloody spinal tap (70). The ship's physician was not called to testify and deny the truth of these objective findings, nor did petitioner's counsel explain his absence.

Without the ship's medical record as a guide, the United States Public Health Service Hospital concluded that the respondent had "possible conversion reaction in an hysterical personality" (63a). Respondent's medical expert testified that the initial hospitalization was most important (71a), and that the report thereof was not to be found in the hospital records, particularly the note of a bloody spinal tap which is highly significant to show laceration or bleeding inside the brain (72a). Petitioner's Dr. Echlin agreed that the initial ship's findings "are most important to be determined and then recorded" (57) and that prior to July 20, 1961 he encouraged the respondent as to his condition, which he diagnosed before the motorcycle accident to be a "mild cerebral concussion" (54), and that good practice required the ship's hospital

records be transferred with the patient, the failure of which could result in a mis-diagnosis (55, 60). Another medical expert called by petitioner conceded that the ship's notation of vomitation on three occasions was "of interest," that the doctor who could best testify about the meaning of the spinal tap taken aboard the vessel would be the ship's doctor himself (65), and on the diagnosis of hysteria there would not have been a blackout "where there is any realistic possibility of being injured" (64).

Following extensive in-patient and out-patient treatment at the U. S. Public Health Service Hospital, in August, 1960, respondent returned to sea (32a, 33a). He suffered recurrent blackout episodes, ending sometime in May, 1961 (37a), experienced mostly when he would jump out of bed quickly or rise suddenly (37a, 38a).

On July 20th, 1961, about two months after having last experienced any symptom described as a blackout, some friends came to his home with motorcycles (38a). He operated one that the parties stipulated would be described by the owner as being in good condition, and with the owner's consent (41a, 42a). Respondent had operated motorcycles many times before, without ever experiencing an accident (38a).

The motorcycle had been parked on a wet, grassy area, and after being choked and put in first gear, the front tire came upon the asphalt road and skidded (39a). Respondent recalled taking the motorcycle out of the skid, and then "I think I had one of those lousy blackouts again. . . . It must have been because I don't remember anything except opening my eyes and I saw this house right in front of me and I had no time to do anything" (40a). He experienced about the same feeling when he came out of

this blackout just before striking the house across the street as when he recovered from prior blackouts (40a). After the crash he "felt nothing" (41a), consistent with a later diagnosis of "transection of the spinal cord of C-5 level . . ." (42a), and thereafter while hospitalized suffered from the same blackouts he had experienced before the motorcycle incident (43a).

John Karaban, an eyewitness to the occurrence and who heard respondent's spontaneous remarks immediately thereafter, first observed the owner of the motorcycle choke it for respondent (17). It then started in the direction of the bay, went into a skid, then came out of the skid facing the house across the street, about 70 to 75 feet away (18, 19). The skid had started on the grass shoulder in front of respondents' house (19). After successfully coming out of the skid, the motorcycle then proceeded upright and straight into the house across the street (18, 19). Respondent's head was back, the motorcycle did not deviate from its direct course, and on the basis of his experience the witness testified that a loosened grasp of the handlebars, as when the operator might lose his senses, would not affect the power of the motorcycle to keep going (19, 20). He further described the incident on cross-examination as follows:

> "No. He started up and it skidded around, and then it straightened up and went on and hit the house" (20, 21).

Karaban ran over to the respondent who told him he had no feelings in his legs "and that he didn't remember traveling on the grass to the house after the skid. The first thing he remembered after that was the house in front of him" (18).

This is corroborated by the owner of the house struck by the motorcycle, Mary O'Keefe, who came upon the conscious respondent and heard him spontaneously state "that all of a sudden he saw the house in front of him". (22). This witness also testified about the number of lights that sufficiently illuminated her premises (22, 23).

Respondent's wife, Gloria Dawn Ammar, married to him for seven years, testified that before his service aboard petitioner's vessel respondent did not suffer any periods of unconsciousness, whereas he did thereafter (23-25). To support her and their three minor children he was compelled to return to sea on August 19, 1960 (25, 67a), and that though she had performed nursing care for him at home subsequent to the motorcycle incident, she could not continue to do so because of the children's needs and her own physical condition (25, 26).

Respondent was born on June 1, 1932, less than 28 years of age in November, 1959 (20a), with an average remaining life expectancy of 43.08 years from the date of his shipboard accident, and 39.36 years remaining from the date of trial (39). He had previously served in his highest rating as a junior engineer (16a). He had been declared physically fit to serve aboard the S.S. Independence by a company doctor (17a), and records of the petitioner showed that his earnings aboard petitioner's vessel were approximately $6,000.00 a year (155a). His work performance had been well regarded (36).

ARGUMENT

Petitioner seeks to upset a unanimous jury verdict based on special interrogatories in favor of a young Jones Act seaman, who became a totally and permanently disabled quadriplegic by reason of petitioner's negligence. After recording the jury's affirmative response to the question "Was the defendant's negligence a proximate cause of the accident which occurred on July 20, 1961" (152a, 163a), i.e., the motorcycle accident of July 20, 1961, by reason of a blackout causally related to the prior accident of November 29, 1959, the trial Judge, the initial panel of the Court of Appeals, and the Court of Appeals *en banc*, unanimously refused to disturb the verdict.

On an aborted Statement of Facts, and on local, antiquated common-law decisions rendered before more recent mandates from this Court, grounded in different policy and purpose, petitioner continues to disregard the principle that a jury verdict for respondent compels acceptance of his factual contentions, even if supported by the slightest evidence, in the light of progressive and humanitarian principles enunciated by this Court in favor of Jones Act seaman.

We have set forth the Questions Presented from respondent's viewpoint, as well as a concise Statement of facts to fill the gaps in petitioner's self-serving Statement. On the contention by respondent of plain error and that all issues incidental to the petition, and considered by the Court below, are subject to review by this Court (*U. S. v. Raines*, 362 U. S. 17, 27 at footnote 7, 80 S. Ct. 519, 526; *Walling v. General Industries Co.*, 330 U. S. 545, 67 S. Ct. 883; *Public Service Commission of Puerto Rico v. Havemeyer*, 296 U. S. 506, 56 S. Ct. 360; *Story Parchment Co. v.*

Paterson Parchment Paper Co., 282 U. S. 555, 51 S. Ct. 248; *Kessler* v. *Strecker*, 307 U. S. 22, 59 S. Ct. 694; 28 United States Code 1254), respondent requests that this Court summarily render the jury's answers to the special interrogatories consistent, so that the eleventh answer finding damages in the amount of $455,216.67 (153a) be undiminished by the erroneously permitted jury's finding of 59.64 per cent contributory negligence.

Should respondent's prayer for additional damages prompt this Court to consider a remand for re-trial on all issues, then as a practical matter related to pressing needs for himself and family, as well as the physical and mental hardships that are entailed in a re-trial, the totally paralyzed respondent would withdraw his alternate contentions and pray this Court to deny the petition.

POINT I

The advanced and humanitarian principles of maritime law under the Jones Act, embracing the related F.E.L.A., were properly and fully charged herein on negligence, foreseeability and proximate cause.

This Court has held that the wrong is greater where liability of a shipowner is grounded in negligence rather than liability without fault for unseaworthiness, as "Those risks are avoidable by the owner to the extent that they may result from negligence" *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, 94, 66 S. Ct. 872, 877. Though the opinion of the Court of Appeals below agrees with petitioner that the Charge withdrew from the jury the question of remoteness of damages with respect to the negligence claimed, nonetheless a reading of the entire Charge clearly shows that the definitions of negligence, to include foreseeability, and

proximate cause as "a natural and continuous sequence, unbroken by any efficient intervening cause", were applied to both the shipboard and motorcycle accidents.

This is found in the Charge, as follows:

> "Under the Jones Act, it is not necessary that defendant's negligence to (sic) the sole proximate cause of that injury. It is sufficient if defendant's negligence played any part, even the slightest, in producing the injury" (139a),

and "negligence" was previously defined generally as follows:

> "It is the failure to exercise reasonable care, that is, the care which a reasonably prudent person would exercise under the circumstances, in the management of his property or person, *provided that it is reasonably foreseeable* that the failure to exercise such care would result in injury to someone in plaintiff's situation" (138a, emphasis added),

which was clearly applied to the instructions on the motorcycle incident, as follows:

> "If you find that plaintiff did 'black out' on the motorcycle and that his 'blackout' was in fact caused by organic brain damage sustained by him by reason of his fall on November 29, 1959, then you may find that the unseaworthiness of the vessel *or the negligence of the defendant was a proximate cause* of the accident of July 20, 1961" (141a, 142a, emphasis added).

It is axiomatic that instructions must be construed as a whole, even if part taken alone may be deemed inadequate. *Hearst Corporation v. Cámara Press, Inc.*, 291 F. 2d 714.

It is also fundamental that the Jones Act (46 U. S. C. 688) is unaffected by "local views of common-law rules" and incorporates by reference the Federal Employers' Liability Act (45 U. S. C. Sec. 51 et seq.). *Garrett v. Moore-McCormack Co.*, 317 U. S. 239, 244, 63 S. Ct. 246, 250. This is coupled with the solicitude with which seamen are traditionally viewed, adopting the language of Justice Story that "They are emphatically the wards of the admiralty . . ." (p. 246 of 317 U. S.).

The policy and purpose of Supreme Court decisions affecting seamen are significantly applied to the instant case by *Pope & Talbot v. Hawn*, 346 U. S. 406, 408, 409, 74 S. Ct. 202, 204, 205, as follows:

> "The harsh rule of the common law under which contributory negligence wholly barred an injured person from recovery is completely incompatible with modern admiralty policy and practice. Exercising its traditional discretion, admiralty has developed and now follows its own fairer and more flexible rule which allows such consideration of contributory negligence in mitigation of damages as justice requires. Petitioner presents no persuasive arguments that admiralty should now adopt a discredited doctrine which automatically destroys all claims of injured persons who have contributed to their injuries in any degree, however slight".

The Supreme Court had long ago expressed the principle that where there is no intermediate efficient cause, the original wrong must be considered as reaching to the effect and proximate to it. *Milwaukee Railway Co. v. Kellogg*, 94 U. S. 475, 24 L. Ed. 256. In *Oliveras v. P. S. Lines Co.*, 318 F. 2d 890, 893, the Court stated that a proper Jones Act Charge need only recite that liability flows from negli

gence which is the proximate cause in whole or in part of injuries thereby sustained.

Further, petitioner fails to understand and accept the policy and thrust of pertinent Supreme Court cases strongly favoring railroad workers and Jones Act seamen, particularly *Gallick v. Baltimore & Ohio Railroad Co.*, 372 U. S. 108, 83 S. Ct. 659 (1963), wherein the following is stated:

> "It is widely held that for a defendant to be liable for consequential damages he need not foresee the particular consequences of his negligent acts; assuming the existence of a threshold tort against the person, then whatever damages flow from it are recoverable . . . (cases and authorities cited) . . . such a tortfeasor must compensate his victim for even the improbable or unexpectedly severe consequences of his wrongful act" (p. 667 of 83 S. Ct.).

From the foregoing it is apparent that under the circumstances of respondent's prior habit of riding a motorcycle, coupled with his innocent belief from petitioner's motivated assurances that he was well, his operation of the motorcycle was normal and expectable, without any evidence to show it was an efficient break in the chain of causation. Cf. *Bonici v. Standard Oil Co.*, 103 F. 2d 437. Riding motorcycles was natural and probable for him to do, a test resolved from the effect of the known habits of human beings with respect to foreseeability. Respondent did not fail to take self protective measures against the danger created by the petitioner, nor did he create a danger equivalent to the "last clear chance doctrine", to be the final and decisive cause of the harm. The proof is clear, and the Charge without exception so stated, that the cause of respondent's loss of control of the motorcycle had

to be found to be the blackout (141a, 142a), which was found by the jury to be proximately related to organic brain damage from the shipboard accident.

On the subject of subsequent accidents due to weakened physical condition caused by negligence, explained in Comment "a", to apply where a second accident increased the harm [illegible] produces different harm, Sec. 460, Restatement of Torts, is pertinent:

> "If the negligent actor is liable for an injury which impairs the physical condition of another's body, the actor is also liable for harm sustained in a subsequent accident which would not have occurred had the other's bodily efficiency not been impaired".

Attempts by the wrongdoer-petitioner to blame respondent for lack of knowledge in operation of the motorcycle, or an assumed risk with knowledge of a disability, are entirely unproven and without any relevance to this case. The innocent reliance by respondent on the assurances of well being from petitioner's examining physician and the mis-diagnosis of the U. S. Public Health Service, prompted by petitioner's negligent failure to furnish the ship's hospital record, does not relieve petitioner from liability if its mis-conduct in this respect, coupled with its initial negligence be an efficient cause, as found by the jury, by the fact that there might be another concurrent cause for which it is not legally responsible, such as the riding of the motorcycle.

POINT II

The doctrine of avoidable consequences rather than a common law bar for consequential injuries would apply to diminish damages had respondent failed to exercise due care, which is denied.

Petitioner contends belatedly that its request to Charge number 14 embodies the substance of the avoidable consequences doctrine. Apparently it does not. This erroneous all or nothing request related to negligence alone is set forth on page 11 of the petition as follows:

> "If you find that under the circumstances, the riding of the motorcycle was negligent, then you must find for defendant with respect to the damages flowing from the second accident."

Implied in petitioner's quotation from Harper and James, *Law of Torts*, (1956), Vol. 2, Sec. 22.10, set forth on page 11 of the petition, is that the plaintiff is not completely barred by any contributory negligence on the duty to mitigate damages under the rule of avoidable consequences.

Assuming arguendo, which is denied, that respondent's negligence played a role in the total picture of damages, even so the rule in *Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500, 77 S. Ct. 443, must be applied to this class of cases. The jury verdict there was reinstated on the basis of the jury's exclusive function, and that defendant's negligence need not be the "sole, efficient, producing cause of injury" (p. 506 of 352 U. S.), the slightest employer negligence being sufficient, a principle not to be varied by "differing conceptions of negligence applicable under

state and local laws for other purposes" (footnote 13, p. 507 of 352 U. S.).

During the same term of Court, in *Webb* v. *Illinois Central R. Co.*, 352 U. S. 512, 77 S. Ct. 451, specific reference to the issue of causation prompted application of the *Rogers* holding that though there be other causes, "including the employee's contributory negligence," the slightest employer negligence would be enough to impose liability (p. 516 of 352 U. S.).

In McCormick, Law of Damages (Hornbook Series), West Publishing Co., 1935, the principle held applicable was contributory negligence only for the initial harm, not applicable at all to avoid the happening of the subsequent event, being instead the doctrine of "avoidable consequences and under which a plaintiff, with an otherwise valid right of action, is denied recovery *for so much* of the losses as are shown to have resulted from failure on his part to use reasonable efforts to avoid or prevent them" (pp. 951, 952 of 234 F. 2d, emphasis added).

In Accord:

The Noah's Ark v. *Beatle & Fitton Corp.*, 292 F. 2d 437 (1961).

Pertinently stated in *McCormick*, *supra*, at page 141, is the following:

"... if plaintiff neither knows nor has reason to know of the need for taking steps to avert damages, his failure to take such steps will not prejudice him ... Again, the plaintiff's failure to act to guard against injury will not affect his recovery where such failure was due to assurances given him by the defendant himself".

A case cited by petitioner, *Ellerman Lines, Ltd.* v. *The President Harding*, 288 F. 2d 288, Friendly, C.J., presented an analogy of personal injury cases to a question involving collision of two vessels, and stated that the doctrine of avoidable consequences means that if the plaintiff takes action within the range of reason, the defendant is liable for further damages resulting therefrom, and if a wrong forces a choice, the tortfeasor cannot be heard to complain that one rather than the other is chosen, for "The standard of what reason requires of the injured party is lower than in other branches of the law" (p. 290 of 288 F. 2d).

Holding that proximity in point of time or space is no part of the definition of proximate cause, the Court in *Southern Pacific Co.* v. *Ralston*, 62 F. 2d 1026 (C. C. A. 10, 1933), also stated the following on intervening cause:

> "But the connection is not actually broken, if the intervening event is one which might, in the natural and ordinary course of things, be anticipated as not entirely improbable, and the defendant's negligence is an essential link in the chain of causation" (p. 1028 of 62 F. 2d).

It follows from the foregoing that despite respondent's possible concurrent partial contributory negligence while upon the motorcycle, concededly not sole or wilful misconduct, where the jury found petitioner's shipboard negligence the continuing and efficient cause of the consequential damages, at the very least the verdict and judgment as they now stand should remain undisturbed.

POINT III

Plain error in the charge that favored petitioner, as regards its heavier burden under the consequential damages doctrine, should be corrected on review by a summary striking of the jury's answers to interrogatories which reduced the verdict by 59.64 per cent.

Petitioner cannot seek a new trial because of an inadequacy of instructions as to the measure of consequential damages, for where not requested "The inadequacy of instructions as to the measure of damages are not grounds for reversal." *Western & Atlantic R.R.* v. *Hughes, Adx.*, 278 U. S. 496; *Louisville & National R.* v. *Holloway*, 246 U. S. 525.

Rule 51, F.R.C.P. has an important application to the proper administration and disposition of trials. It was so held in *Troupe* v. *Chicago, D. & G. Bay Transit Co.*, CCA 2, 234 F. 2d 253, where the majority opinion by Waterman, *C.J.* affirmed the great weight of authority against appellate consideration of error in the Charge, even "on a significant aspect of the case", when a party has failed to comply with Rule 51 (footnote 10, p. 260 of 234 F. 2d).

Petitioner's position with respect to consequential injuries is posed by one concededly a wrongdoer for the threshold tort. Causal relationship and liability should be determined by the deep-rooted and fundamental principle of justice afforded Jones Act seamen. Accordingly, respondent is deserving of the relief sought under this point heading, for gross damages, found by the trial Court not to be excessive.

In *Gallick* v. *B. & O. Railroad Co.*, *supra*, a similar issue of inconsistency was resolved as follows:

"But it is the duty of the courts to attempt to harmonize the answers, if it is possible under a fair reading of them: 'Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way . . . before we are free to disregard the jury's special verdict and remand the case for a new trial" (p. 666 of 83 S. Ct.).

In Accord:

Atlantic & Gulf Stevedores, Inc. v. *Ellerman Lines, Ltd.*, et ano, 369 U. S. 355, 364, 82 S. Ct. 780, 786.

Gallick goes further to hold that though no similar incident had previously occurred, nor known to the railroad to have occurred, this would not be determinative, as the absence of reason for anticipating a mishap or injury would be "—a far too narrow a concept of foreseeable harm to negative negligence under the Federal Employers' Liability Act" (p. 667 of 83 S. Ct.). Many authorities are cited to support the pertinent proposition that once the threshold tort is established, a defendant is liable for consequential damages, caused by it even "in the slightest part", though the particular consequences are not foreseeable.

The jury found the threshold negligence to be a proximate cause of respondent's consequential injuries, and awarded damages in a specific amount of $455,216.67 as recited in answer to the eleventh special interrogatory. As the jury found causal connection between the threshold negligence and consequential injuries, all else thereafter is surplusage. Accordingly the jury's erroneous reduction by 50.64 per cent in its 12th and 13th Answers should be summarily stricken, as they are prompted by a wrong theory of law charged by the Trial Court and on petition

er's failure to reques proper instructions on consequential damages.

CONCLUSION

Respondent had adequately proven his causes of action for the threshold tort and that the consequential damages were proximately and foreseeably related thereto, in light of current law and authority favoring Jones Act seamen. With respect to petitioner's contentions, the Trial Court's Charge was unexceptional. If this Court agrees with the Trial Court that the comparative negligence doctrine is applicable to the second incident, either as a matter of ruling law in maritime cases, or because timely exception was not taken by either party when special questions were posed to the jury, then of course the verdict and judgment thereon as they stand should remain unaffected.

On the other hand, if this learned Court agrees with respondent's contention that the special verdict was inconsistent only as it improperly reduced the gross damages on the second incident for consequential injuries, then without ordering a new trial the inconsistency should be corrected by affirming the first eleven special answers. This would be in accordance with the humanitarian policy inherent in ruling Supreme Court decisions applicable to seamen as wards of the Court, coupled with petitioner's failure to request a charge under the "avoidable consequences" doctrine, now precluded by Rule 51, F.R.C.P., and that its heavier burden in this respect was not met in the record of the case.

To grant petitioner's request for a new trial would be in tragic disregard of the clearly proven causal relationship between the threshold tort and the consequential quadriplegia permanently imposed on a young seaman.

proximately caused by a "blackout" following organic brain damage, initially obscured by petitioner's continuing fault.

Wherefore, it is respectfully urged that damages of $455,216.67 found in the jury's eleventh special answer be substituted in lieu of the sum of $183,725.45 found in its fourteenth special answer, or as an alternative, that the present judgment remain undisturbed, without granting a new tri , and that the petition be denied in all respects.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 157

AMERICAN EXPORT LINES, INC.,
Petitioner,

v.

HOWARD ALI AMMAR,
Respondent.

REPLY BRIEF OF PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 1192

AMERICAN EXPORT LINES, INC.,

Petitioner,

v.

HOWARD ALI AMMAR,

Respondent.

REPLY BRIEF OF PETITIONER

Statement

The brief of respondent glosses over the fact that respondent was not even fit for sea duty at the time of his motorcycle accident (Appendix B, 5a, Appendix Record, Vol. I, p. 50a). Beyond this neither the U. S. Public Health Service nor Dr. Francis A. Echlin, who had examined respondent, and whose reports were furnished to respondent's counsel, had pronounced him cured, notwithstanding the repeated inferences to the contrary contained in respondent's brief on pages 3 and 14. Respondent had been found fit for sea duty; never fit for motorcycle riding.

Secondly, respondent's attempt to muddle the real issue of the necessity of a proper charge as to interpretation of the applicable legal principles, inferentially sustains peti-

tioner's argument. Otherwise the issue would have been met squarely.

Finally, respondent attempts to raise for the first time entirely without foundation below the question of medical records without referring to any portion of the record where any medical records were requested by the U. S. Public Health Service or where any Public Health Service physician either testified or indicated that crude shipboard tests would be necessary in addition to the hospital tests available at a Public Health Service Hospital.

In fact neither the prior U. S. Public Health Service treatment records nor the Bay View General Hospital records covering respondent's hospitalization immediately after the motorcycle accident were requested by or forwarded to the U. S. Public Health Service Marine Hospital in Staten Island, where the final diagnosis was made.

Argument

The real issue is whether in a Jones Act case this Court will permit an issue vital to the case to be withheld from the jury. This question, of course, was whether a jury may speculate in attributing a motorcycling accident, caused 50% by plaintiff's negligence, to an earlier shipboard accident without regard to accepted principles of causation. Whether this question is couched in terms of foreseeability, intervening cause or avoidable consequences, the fact remains that in its motion and requests to charge petitioner took the position that if respondent was entitled to recover for negligence, then, the damages should be determined according to the principles of reasonable foreseeability, avoidable consequences, and intervening cause. This was raised by requested instructions, all of which were expressly denied by the trial Judge (Appendix, Record,

Vol. I, p. 149a). To contend, as respondent does in his brief on pages 4 and 15, that in failing to identify request #14 as one made under the doctrine of avoidable consequences, petitioner failed to make a proper request, is but to beg the question. Petitioner's request #14 succinctly recited this doctrine:

> "If you find that under the circumstances, the riding of the motorcycle was negligent, then you must find for the defendant with respect to the damages flowing from the second accident." [Appendix Record, Vol. I, p. 121a]

Respondent's interpretation of the doctrine of avoidable consequences is at variance with all of the leading text writers cited in the petition at page 10. Moreover, respondent's likening of petitioner's interpretation to the old common law concept of contributory negligence is patently fallacious. Clearly, under the doctrine of avoidable consequences plaintiff's recovery is not totally barred, only that portion of the damages attribuable to his failure to exercise due care. In the instant case, respondent is entitled to the damages suffered as a result of the shipboard accident, and petitioner has never argued to the contrary.

Respondent has lost sight of the application of *Kernan* v. *American Dredging Co.*, 355 U. S. 426, to this case and in particular with the principles under the Federal Employers' Liability Act incorporated by reference in the Jones Act, 35 Stat. 65, as amended, 45 U. S. C. 51-60, 41 Stat. 1007, U. S. C. 688 which likens the liability of an employer under the FELA and the Jones Act to an employer in workmen's compensation. The majority opinion is especially specific at pages 431-432 where it points out that as industry and commerce became sufficiently strong to bear the burden, the law, the reflection of an evolving public policy, came to favor compensation of employees for losses occasioned by

the inevitable injuries of industrial employment. This change, in most industries, has been embodied in Workmen's Compensation Acts and in the railroad and shipping industries by the FELA and the Jones Act. However, compensation liability has been specifically limited by the State of New York in *Sullivan* v. *B & A Construction Co.*, 307 N. Y. 161 (1954) to liability for accidents incurred at or because of work, not to accidents occasioned primarily by the employee's own negligence in operating motor vehicles.

The jury's answers point out the substance of petitioners arguments. Had the instructions been proper, the answers indicate the verdict would have been different. Petitioner sharply challenges the improper instructions given the jury following the submission of all the evidence. In referring to the charge of the trial Judge, respondent in the second quoted paragraph on page 11 of his brief, sets forth the general definition of negligence as given by the trial Judge, with which petitioner has no quarrel. It is the third quoted paragraph on page 11, containing the specific instructions to the jury as to how they should apply the general law to the specific facts of the case that creates the error. This paragraph permitted the jury to find liability absent the essential ingredient of reasonable foreseeability. For in this instruction, the trial Court said that if you find plaintiff did "blackout" by reason of the injuries sustained aboard ship, then you may find defendant negligent. Obviously this bare instruction did not permit the jury to consider, in arriving at its finding of negligence, the fact that others may have directly caused the accident by loaning respondent the motorcycle or that respondent failed to exercise due care in boarding the motorcycle. Moreover, respondent's already tenuous argument is rendered weaker by the opinion below, which concedes petitioner's point that this question was, in fact,

withheld from the jury (Petition, p. 7a). While petitioner disagrees with the remainder of the opinion below, there is no question that the jury was not permitted to consider this aspect of the case. The case of *Rogers* v. *Missouri Pacific R. R. Co.*, 352 U. S. 500 (1957), which is cited as the authority for withholding this question from the jury, is an inappropriate authority for this proposition, since this Court in *Rogers* did not even consider the question of "remote" or subsequent damages, and the injured railroad worker in *Rogers* was not involved in a subsequent accident.

Point III of respondent's brief (p. 18) is a plea for extraordinary relief in that it seeks to compound the error below without having raised an appealable point. Respondent argues that since plain error was committed in permitting the jury to reduce the damages flowing from respondent's motorcycling accident, the full damages should be restored. However, as pointed out in the opinion below (Petition p. 10a), if the court below had acted on this error, then it would have been required to take the next logical step and completely bar this aspect of the recovery.

Respondent did not except to the trial court's instructions to the jury nor did he submit any request to charge embodying his erroneous interpretation as to the rights of the parties with respect to the motorcycling accident damages. Nonetheless as stated in the opinion below, a decision on the question of the applicability of comparative negligence principles to subsequent damages is implicit in the analysis of the problem of remoteness of damages by the court below (Petition p. 10a). While the petitioner contends that if proper instructions had been given this question would not have been reached, petitioner throughout the trial urged that if plaintiff's own negligence caused or contributed to the motorcycle accident that should preclude him from recovery of any of the increased related damages (Appendix Record, Vol. I, pp. 121a, 124a, 149a).

As to the importance of a charge the function of a Court is not to reweigh evidence, *Sentilles* v. *Inter-Caribbean Shipping Corp.* 361 U. S. 107, rather it is to give a proper charge so the jury's verdict can be in accordance with the law.

In conclusion, respondent's argument urges this Court to forge a rule of law which would permit a seaman injured aboard ship to carry on his life thereafter with complete abandon. While at first blush the awarding of substantial damages to an injured seaman has a certain appeal, the underlying policy considerations are manifest. The principles of social responsibility demand that following an accident the injured party must exercise reasonable care for his own safety, especially where the shipowner is no wise in a position to prevent the subsequent accident.

Dated: New York, N. Y., June 26, 1964.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 157

AMERICAN EXPORT LINES, INC.,
Petitioner,

v.

HOWARD ALI AMMAR,
Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 157

AMERICAN EXPORT LINES, INC.,
Petitioner,

v.

HOWARD ALI AMMAR,
Respondent.

PETITION FOR REHEARING

Petitioner prays that this Court grant rehearing of its order of October 12, 1964, denying the petition for writ of certiorari U. S. , and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit in the above entitled case, as prayed for in the petition filed June 6, 1964, herein.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

1. At the time of this Court's order of October 12, 1964, there were not only conflicting decisions as to question #1 (Pet. p. 2), but the opinion below set forth a novel rule of Maritime Law not only in conflict with all of the major text writers (Pet. p. 10), but also without judicial

authority as to question #2 (Pet. p. 2, 10a). Furthermore, in reviewing the actions taken by the Court during October, petitioner notes a sharp reduction in the Court's acceptance of cases for review particularly those not involving Civil Rights or criminal matters. While the petitioner recognizes the overwhelming burden thrust on the Court by the Civil Rights struggle, of which we are all so acutely aware, recently rendered even more pressing by the new Civil Rights legislation, petitioner respectfully submits that the entire Judiciary is also concerned with the volume of Jones Act and F. E. L. A. litigation. The decision below at the very least portends confusion and, indeed, at most encourages fraud and injustice.

That this is important is stressed by the fact that increased costs will result in the laying up this winter of three of the seven American flag transatlantic passenger ships (America, Exeter and Excalibur).

At the heart of petitioner's argument in the case at bar is the fact that the case of *Rogers* v. *Missouri Pacific R. R. Co.*, 352 U. S. 500 (1957) does not foreclose in a Jones Act case the application of causation analysis to limit liability for remote damages, as was held in the opinion below (Pet. p. 8a). Nor does *Rogers* require that the question of foreseeability or efficient intervening cause be withdrawn from the jury by the Trial Judge, again as held in the opinion below (Pet. p. 7a).*

*Notwithstanding the assertion to the contrary appearing in the opinion below (Pet. p. 7a) that the District Court concluded that the employee's negligence was not an intervening efficient cause breaking the chain of proximate causation, there was no such conclusion on the part of the District Court and this contention is manifest by the fact that the District Court did, in fact, include in its instructions on unseaworthiness the concepts of forseeability and efficient intervening cause, which instructions would have been ambiguous, confusing and completely superfluous if such a conclusion had been reached by the Trial Court (Pet. p. 7a 1st quoted paragraph).

Obviously the *Rogers* decision not only permits but requires causation analysis. While if defendant's negligence played any part, even the slightest, in producing plaintiff's injury, liability will follow, the door to liability can nonetheless only be opened by negligence. Foreseeability, of course, remains an essential element of negligence and this Court recently reaffirmed this axiomatic principle in the case of *Gallick* v. *Baltimore & Ohio R. R. Co.*, 372 U. S. 108 (1963).

As might well be expected Trial Courts have had difficulty in attempting to frame jury instructions following the holding of the *Rogers case*.

For example, note two recent conflicting decisions. In *Bertrand* v. *Southern Pacific Co.*, 282 F. 2d 569, 572 (9 Cir. 1960), the Trial Court was affirmed after having *rejected* plaintiff's requested instructions paraphrasing in part the language of the *Rogers* case. In an attempt to explain the import of the *Rogers* case, the Court stated:

> "The Court in that case, however, was not speaking of the 'test of liability of the railroad carrier' (the language used in the proposed instruction) 'but the test of a jury case' ". Ibid. at 573.

Further, the Supreme Court of Oregon as recently as March 4, 1964, impliedly conceded that it was confused with respect to the import of the *Rogers* case. *Brigham* v. *Southern Pacific Co.*, 390 P. 2d 669. This F. E. L. A. case was submitted to a jury, the defendant railroad prevailed and the employee appealed. The Trial Court gave the jury the traditional instruction with respect to proximate cause, including instructions on foreseeability and efficient intervening cause and the basis of plaintiff's appeal was his exception to such instruction. The Appellate Court in affirming the judgment below actually held that plaintiff's excep-

tion was inadequate to focus the Trial Court's attention on the troublesome issue presented in the case. However, the Court, in stating that, since the decision in *Rogers*, it appears that the traditional instruction is not permissible (citing the case at bar among others), also said:

> "It is clear that in a Federal Employers' Liability Act case submitted to the jury an instruction must be given that requires a finding of a causal relation between the acts of alleged negligence and of plaintiff's injury in order to establish a defendant's liability. The *cases do not make it clear as to what that instruction should say.*" Ibid. at 670 [Emphasis added.]

It is pertinent, if not controlling, to point out that certiorari was denied in the case of *Bertrand* v. *Southern Pacific Co.*, 365 U. S. 816 (1961) *supra*, which is difficult to reconcile with the Court's order of October 12, 1964 denying certiorari in the instant case.

2. The remaining question, which requires review, is the approval in the opinion below of the Trial Court's plain error, as contended by both parties on appeal, in charging the jury in terms of comparative negligence with respect to the seaman's subsequent shoreside accident. The only possible rationale for the Court's forging of this unique concept lies in the emotional thrust of plaintiff's case, which is hardly productive of the consistency and predictability required of our system of jurisprudence. In the opinion below, the Court scuttled respondent's cross appeal with the statement that he had not properly preserved this plain error by an objection to the Trial Court instructions.

The Court below did not even attempt to meet petitioner's argument that the doctrine of comparative negligence was not the appropriate vehicle for determining the rights of the

parties with respect to the damages flowing from the shoreside accident. However, the Court below did hold that:

> "[T]he liberal policies of the Jones Act are best served by the apportionment of consequential damages on the basis of fault rather than by the all or nothing rule of liability . . .";

despite the fact that during its 30 odd years of existence the statute has never been so construed. Petitioner contends that a seaman suing under the Jones Act has no greater rights than any other citizen of the United States with respect to the damages flowing from a subsequent shoreside accident. Obviously, the rights of the parties with respect to the damages flowing from the subsequent shoreside accident should have been determined by the jury, but only after the jury had been instructed in accordance with the respondent's expressly denied requested instruction #14, to wit:

> "If you find that under the circumstances, the riding of the motorcycle was negligent, then you must find for defendant with respect to the damages flowing from the second accident."

The foregoing instruction succinctly recites the essence of the universally recognized rule of law that a person convalescing from an injury has a duty to exercise due care to avoid further injury and failing to do so he must bear the loss. Harper & James, *Law of Torts* (1956) Vol. II §§ 22.10 p. 1231-32, 25.4 p. 1307. *Restatement of Torts*, Vol. IV, § 918; Prosser, *Law of Torts* (2 Ed. 1955) p. 287; McCormick *On Damages* (1935) § 33; Clark *New York Law of Damages*, (1925) § 113. The need and reason for this time tested legal principle leave no room for fraud and place the duty to exercise due care on the person best able to avoid subsequent injury.

Clearly the statute enunciating the doctrine of contributory negligence stating as it does that the contributory negligence of the employee shall not bar a recovery was enacted to circumvent the common law "all or nothing rule" of contributory negligence in the case of an on-the-job accident. The statute was meant to set the seaman and the railroad worker apart only with respect to on-the-job accidents and to compensate them for injuries sustained on-the-job. But this extraordinary remedy was not intended to set the seaman and the railroad worker apart from other workers, who were then and are now precluded from recovering remote damages when they are subsequently injured due to their own failure to exercise due care while recovering from an industrial accident. *See Sullivan v. B. & A. Construction Co.*, 307 N. Y. 161 (1954).

The administration of the Jones Act and the F. E. L. A. requires that the foregoing questions be reviewed in order to clear up the confusion aboard with respect to the place of causation analysis if any, in this important and overburdening body of federal litigation.

3. That this case is *sui generis* on the particular facts is no reason to deny certiorari. It is the questionable cases that get tried. Any definition of the limits to be observed in allowing consequential damages will be most helpful in clearing calendars. Jury charges will be clarified but more important for efficient judicial administration, cases will be more readily evaluated, which in turn will facilitate pre-trial disposition. Considering the volume of Federal Employees Liability Act legislation, any definitive decision will be helpful in reducing the present calendar log jam and in facilitating trials of other cases. Justice delayed is justice denied.

CONCLUSION

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Second Circuit.

Respectfully submitted,

JAMES M. ESTABROOK
Counsel for Petitioner

HOLLIS M. WALKER,
Of Counsel

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay, and is restricted to grounds specified in Rule 58 of the Rules of this Court.

JAMES M. ESTABROOK
Counsel for Petitioner

MOTION FILED

DEC 15 1964

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 157

AMERICAN EXPORT LINES, INC.,
Petitioner,

—against—

GLORIA DAWN AMMAR, as the Administratrix of the estate of HOWARD ALI AMMAR, deceased,
Respondent.

PETITIONER'S MOTION FOR LEAVE TO FILE A SUPPLEMENTAL PETITION IN SUPPORT OF ITS PETITION FOR REHEARING

JAMES M. ESTABROOK
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Of Counsel

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

AMERICAN EXPORT LINES, INC., *Petitioner,* —*against*— GLORIA DAWN AMMAR, as the Administratrix of the estate of HOWARD ALI AMMAR, deceased, *Respondent.*	No. 157

PETITIONER'S MOTION FOR LEAVE TO FILE A SUPPLEMENTAL PETITION IN SUPPORT OF ITS PETITION FOR REHEARING

Petitioner, American Export Lines, Inc., hereby moves for leave to file a supplemental petition in support of its petition for rehearing to bring to the attention of the Court additional reasons for granting the writ arising out of the death of original respondent, Howard Ali Ammar, on June 22, 1964, as to which respondent's counsel had knowledge on June 29, 1964, while the Petition for Certiorari was under consideration, but as to which petitioner was first notified on December 9, 1964.

Petitioner had previously filed its petition for certiorari from a decision of the Court of Appeals for the Second Circuit affirming a judgment on the verdict by the United States District Court for the Southern District of New York. The action was under the Jones Act. Respondent recovered $11,000 for the direct consequences of an accident November 9, 1959 on petitioner's vessel and the bal-

ance of $186,261.45 for the consequences of a motorcycle accident on July 20, 1961. The jury found respondent 59.64% negligent as to the motorcycle accident and reduced its award accordingly.

Respondent's death points up the speculative and inequitable elements of the decision below and provides additional reasons for granting the writ.

When respondent was permitted to recover at all for a motorcycle accident as to which he was found 59.64% contributorily negligent, such recovery was based upon medical testimony connecting the shipboard accident to the motorcycle accident. Yet the same medical witnesses also testified that respondent had a normal life expectancy.

When we consider that any rule of law other than the rule requiring injured persons to take due care will always depend upon speculative opinion testimony, the reasons for petitioner's position are all the more compelling.

An additional inequity appears in that respondent's damages for wrongful death are less than for injury resulting in total permanent incapacity. Death damages are based on future contribution by the decedent to his family, while injury damages are based on total earning capacity and future pain and suffering.

This motion is also made to [redacted] dent's counsel the right to reply.

WHEREFORE, petitioner requests leave to file the annexed Supplemental Petition for Rehearing to its Petition for Rehearing filed November 5, 1964.

Respectfully submitted,

JAMES M. ESTABROOK
Counsel for Petitioner

HOLLIS M. WALKER, JR.
Of Counsel

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 157

AMERICAN EXPORT LINES, INC.,
Petitioner,

—against—

GLORIA DAWN AMMAR, as the Administratrix of the estate of HOWARD ALI AMMAR, deceased,
Respondent.

SUPPLEMENTAL PETITION IN SUPPORT OF PETITION FOR REHEARING

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

AMERICAN EXPORT LINES, INC., *Petitioner,* —*against*— GLORIA DAWN AMMAR, as the Administratrix of the estate of HOWARD ALI AMMAR, deceased, *Respondent.*	No. 157

SUPPLEMENTAL PETITION IN SUPPORT OF PETITION FOR REHEARING

STATEMENT

Petitioner, American Export Lines, Inc., submits its supplemental petition in support of its Petition for Rehearing, filed November 5, 1964, to bring to the attention of the Court issues raised by the death of respondent on June 22, 1964, as to which respondent's counsel was retained on June 29, 1964, but as to which petitioner's counsel was first notified on December 9, 1964. On December 9th petitioner's counsel consented to the substitution of Mrs. Ammar, the administratrix, as party respondent; obviously she, as administratrix, is the only and the necessary party respondent. Petitioner does not question her right to be a party.

Had respondent's counsel notified petitioner's counsel in time, the points covered herein could have well been included in the petition for rehearing.

This supplemental petition is being submitted to call the Court's attention to matters arising after the timely submission of the petition for rehearing in accordance with the procedure followed in *Carpenter* v. *Wabash Ry. Co.* 309 U. S. 23 (1940).

Additional Reasons for Granting the Petition for Rehearing and Issuing the Writ.

Respondent had recovered a judgment on a verdict under the Jones Act not only for personal injuries resulting directly from an accident on respondent's vessel on November 29, 1959 at Madeira, but also for injuries following a motorcycle accident July 20, 1961 at Mastic Beach, New York as to which the jury found respondent 59.6% contributorily negligent.

According to respondent's motion for substitution and annexed papers, original respondent died June 22, 1964 of sepsis pyelonephritis (blood poisoning induced by malfunctioning kidneys), quadriplegia and fracture-dislocation of cervical spine.

As appears from the Petition for Certiorari and the Petition for Rehearing, the quadriplegia and the fracture-dislocation of the cervical spine were caused, not by the accident on petitioner's vessel, but by a motorcycle accident on July 20, 1961 when respondent attempted to ride a strange motorcycle at night.

Error was committed when the Courts below concurred that a proper Jones Act jury charge should include neither the universally recognized law that an injured plaintiff has a duty to exercise reasonable care to avoid further injury failing which he must bear the loss nor the doctrine of avoidable consequences, i.e., that an injured party who subsequently sustains further injuries by reason

of his own failing to exercise due care, is precluded from recovery of the consequential damages. The Court of Appeals stated further that foreseeability of harm, indeed, even causation analysis need not be considered by the jury in a Jones Act case.

The case was thus permitted to go to the jury on the theory that respondent's damages, reduced only by comparative negligence, should be based on respondent's prospective loss of earnings and future pain and suffering; respondent's doctors testifying he had a normal life expectancy (Petitioner's App. 85a-86a; Respondent's App. 70).

Now time has proven the fallacy of respondent's arguments and testimony; rather an exhorbitant verdict has been sustained based on conjecture and rationalization; such a result is an invitation to fraud.

This Court has always been ready to review facts elicited after judgment was rendered, as was done in *United States* v. *Pink*, 315 U. S. 203 (1941), where at pages 220 and 221 the Court held that a declaration as to Russian Law (a question of fact, not law) made after judgment had been rendered by the trial Court should have been considered by the New York Court of Appeals.

A similar situation arose when the petitioner in *Gallick* v. *Baltimore and Ohio R. R. Co.*, 372 U. S. 108 (1963) died after this Court had reversed an Ohio Court of Appeals decision setting aside a jury verdict in favor of petitioner. The Gallick case was eventually settled for about two thirds of the jury verdict.

This doctrine of recognizing factors arising after judgment when necessary to accomplish substantial justice has more recently been recognized in *United States* v. *Alabama*, 362 U. S. 602 (1960). Any different rationale will certainly make almost impossible the protection of minority rights in those jurisdictions where enforcement of national policies

depends upon close appellate supervision over uncooperative trial Courts.

CONCLUSION

For the reasons set forth above, in the Petition for Rehearing and in the Petition for Writ of Certiorari, it is respectfully urged that rehearing be granted and that upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Second Circuit.

Respectfully submitted,

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Of Counsel

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing Supplemental Petition for Rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

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